

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

18-P-1358

COMMONWEALTH

vs.

JOHAN SANCHEZ SANTANA.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

This is an appeal from a District Court finding and order, following a hearing, that revoked the defendant's probation based on evidence that the defendant committed new criminal offenses. On appeal, the defendant maintains that the judge committed various errors, including that he abused his discretion when, at the beginning of the final surrender hearing, he denied the defendant's request for replacement counsel. We affirm.

Background. In November 2012, the defendant admitted to sufficient facts for assault,¹ stemming from an incident at a Lynn vocational technical institute during which the defendant

¹ The defendant originally was charged with assault by means of a dangerous weapon; however, the Commonwealth entered a partial nolle prosequi, with the defendant's consent, as to the dangerous weapon portion of the charge.

assaulted a student. The case was continued without a finding, with the conditions that the defendant obey all local, State, and Federal laws, maintain employment, stay away from the victim, and complete certain programs, including an anger management course. While the defendant was on probation,² the probation department issued a notice of violation, alleging that the defendant had committed a new offense and failed to comply with the conditions of probation. The defendant stipulated to the violation, and his probation was extended to September 2016.

A few weeks after the hearing on the aforementioned probation violation, in July 2016, the probation department issued another notice of violation, this time on the basis that the defendant had committed new criminal offenses -- namely, carrying a loaded firearm, assault by means of a dangerous weapon, discharging a firearm, and unlawful possession of ammunition. These charges stem from a shooting at a Lynn barbershop captured on surveillance videos showing two males at the barbershop shooting multiple rounds. Separately, the

² The defendant's probation was originally scheduled to end on June 28, 2013; however, the defendant defaulted on his appearance and a warrant issued for his arrest. This default was removed in August 2013, and his case was continued to October 2013. He defaulted again. This second default was removed in November 2013, and the case was continued to December 2014. He defaulted a third time and removed the default in February 2016.

defendant was indicted on, inter alia, these same offenses in Essex Superior Court.

In October and November 2016, the judge conducted a probation surrender hearing over two days. On the first hearing day in October 2016, the probation department and district attorney submitted several exhibits, including the transcript of two witness from the grand jury proceedings that led to the aforementioned indictment on the new criminal charges. The defendant's probation surrender counsel (counsel) reserved the right to object to the exhibits.

The hearing continued on a second day in November 2016. The exhibits were allowed in evidence, over counsel's objections as more fully set forth below. Following the hearing, the judge found that the defendant had violated probation, revoked the continuance without a finding, and imposed a sentence of eighteen months in the house of correction, with credit for 127 days. The defendant filed the present appeal.

Meanwhile, in March 2018, following a jury trial in Essex Superior Court on the aforementioned indictments, the defendant was found guilty of carrying a firearm, carrying a loaded firearm, discharging a firearm, and three counts of assault by means of a deadly weapon. The Commonwealth entered a nolle prosequi on the charge of possession of ammunition. The defendant's direct appeal from these convictions is pending.

Right to new counsel. The defendant contends the judge abused his discretion when, on the second day of the surrender hearing, he refused the defendant's request to discharge his counsel and to appoint new counsel. "A motion to discharge counsel, when made on the eve of trial, or on the day on which trial is scheduled to begin, 'is a matter left to the sound discretion of the trial judge.'" Commonwealth v. Tuitt, 393 Mass. 801, 804 (1985), quoting Commonwealth v. Moran, 388 Mass. 655, 659 (1983). "Though the defendant must be permitted to present the reasons for his dissatisfaction with his attorney, the judge retains considerable power to discourage last-minute tactics which appear likely to delay the commencement of trial." Id. "The defendant has the burden of showing good cause to remove appointed counsel." Commonwealth v. Britto, 433 Mass. 596, 600 (2001).

Here, after counsel stated his belief the attorney-client relationship had suffered an irretrievable breakdown, the judge immediately conducted a colloquy. Specifically, the judge asked the defendant, "what would you like to say with regard to your representation only?" The transcript indicates that the defendant responded through an interpreter, "Your Honor, I want to say that (indiscernible) counsel." The judge prompted the defendant for further explanation as to why he believed he needed replacement counsel. Again, the defendant responded, but

his response on the transcript is indicated only as "indiscernible." This portion of the record was not reconstructed.³

The transcript of the hearing continues on a portion that the defendant had reconstructed, during which the judge again asked the defendant to explain further the basis for his request for new counsel. After an inaudible portion of the record, the defendant stated, "But I did not violate (inaudible)." The judge then asked the defendant to "go ahead" with his explanation. After another inaudible portion of the transcript, the defendant states, "I was simply driving. (Inaudible.)" The reconstructed record shows that the inaudible portions relate to the defendant's "general complaint" that "his attorney was not helping him, and he requested new counsel."

Following these opportunities for the defendant to explain his reasons for his request for new counsel, the judge attempted to clarify the defendant's apparent confusion that he had already been found in violation of the conditions of his probation,⁴ informing the defendant that he had not yet been

³ As the appellant, the defendant is responsible for reconstruction of any material portions of the record necessary for evaluation of his claims on appeal. Commonwealth v. Woody, 429 Mass. 95, 98-99 (1999). See also Mass. R. A. P. 8 (c) & (e) (3), 481 Mass. 613, 614-615 (2019).

⁴ While the record is not clear, it appears the confusion may stem from the fact that the surrender hearing occurred over two days.

found in violation of the conditions of his probation and that the purpose of the hearing that day was to determine whether a violation had occurred. The judge further explained that counsel was not requiring him (nor could he require him) to admit anything. The judge explained that counsel was "extremely competent and experienced" and that unlike the defendant, counsel had a lot of training in these matters. Following the colloquy, the judge found that the defendant had not articulated "any reason whatsoever" to support his request for new counsel and denied the same. Thereafter, the judge asked whether counsel was "prepared to proceed" and counsel responded, "Yes, Your Honor."

On this record, the judge did not abuse his discretion. He gave the defendant "a fair opportunity to explain the reasons for his dissatisfaction with trial counsel." Commonwealth v. Chavis, 415 Mass. 703, 712 (1993). During the colloquy with the defendant, the judge repeatedly prompted the defendant to explain the basis for his position. See Moran, 388 Mass. at 659 ("The appropriate practice . . . is to hear the defendant's offer of specifications so that the judge's discretion will be exercised on an informed basis" [citation omitted]). Despite giving the defendant multiple opportunities to meet his burden to show good cause for counsel's removal, the defendant failed to do so. See Britto, 433 Mass. at 600. Moreover, counsel

stated he was prepared to go forward with the hearing -- a statement borne out by his conduct at the hearing.⁵ See Tuitt, 393 Mass. at 805 (affirming denial of motion to discharge trial counsel where counsel represented to judge that he was prepared to try case). See also Commonwealth v. Dunne, 394 Mass. 10, 15 (1985) (affirming denial of continuance to allow appointed counsel to withdraw where there was no showing that counsel was unprepared or that defendant would suffer prejudice).

The defendant appears to argue that counsel was not prepared to defend against a finding of a probation violation, and thus "ineffective" because he did not object to proceeding with the surrender hearing and did not seek to modify a protective order that had entered in the Essex Superior Court, prohibiting counsel from providing the defendant with "copies" of the grand jury materials, including the grand jury

⁵ Counsel objected to the admission of the grand jury testimony of the percipient witness, arguing that the witness was unreliable due to the deal he had struck with the Commonwealth in exchange for his testimony. Counsel also objected to the admission of the surveillance videos and the photographic stills therefrom on the ground that the materials were unclear. With regard to whether the defendant violated the condition of his probation, counsel argued that the percipient witness's testimony was unreliable because (in addition to not being subject to cross-examination during the grand jury proceedings and being unreliable due to his motivation to cooperate with the Commonwealth), the witness admitted that he ducked onto the floor when the shooting began and was not able to see the defendant. In marshalling his arguments, counsel referred the judge to the specific transcript page and line numbers, further confirming that he was prepared.

transcript, surveillance videos, and photographs. We disagree. Counsel had full access to these materials, and the record shows that he utilized this evidence to argue against a finding of a violation.⁶

The defendant's argument that counsel was unprepared for the disposition phase of the hearing also is unsupported. During this phase, counsel highlighted the defendant's "minimal" record, the fact that the defendant had no prior firearm charges, and that he had been employed since the time of the underlying offense, specifically listing the defendant's various employers.⁷ He argued that, in view of those circumstances, the defendant should be reprobated, sentenced to six months, or subject to a suspended sentence. Although the judge sentenced the defendant to eighteen months (which was less than the two and one-half years sought by the probation department), he did so based on, *inter alia*, the defendant's behavior while on probation, which included a prior violation of probation and a

⁶ See note 5, supra.

⁷ During the dispositional phase, counsel stated, "I know that [the defendant] would want me to ask that he simply be reprobated because apparently, I think, he has been doing well other than this accusation, on his probation." Contrary to the defendant's contention, it is not apparent from this statement that counsel failed to communicate with the defendant; to the contrary, the statement suggests counsel had communicated with the defendant.

history of defaults.⁸ As such, the defendant's argument regarding counsel's purported unpreparedness and ineffectiveness is unsupported by the record.

Other claims of error.⁹ The defendant argues that (1) the judge erred in allowing in evidence and then relying on hearsay -- namely, the grand jury transcript of the testimony of a percipient witness identifying the defendant as one of two individuals captured on surveillance videos discharging a firearm at the barbershop -- in violation of the defendant's right to confront witnesses against him, (2) the judge abused his discretion in finding a violation, and (3) admission of the hearsay deprived the defendant of the right to present a defense. Each of these claims of error relate to the judge's finding that the defendant violated probation. Because the

⁸ The defendant faults counsel for not explaining to the judge that, although the defendant failed to complete the anger management program, his probation had been extended (after his prior probation surrender hearing just a few weeks before the shooting in Lynn) to permit him to do so but he was arrested before he had the opportunity to complete the program. But counsel did inform the judge that "by the time he got arrested he had actually started the anger management program." In addition, there was evidence that he started the program in 2013. The defendant does not explain why he did not complete the program in the time between 2013 and his arrest in 2016 -- a fact that troubled the judge.

⁹ To the extent that any arguments are not expressly addressed, "they 'have not been overlooked. We find nothing in them that requires discussion.'" Commonwealth v. Brown, 479 Mass. 163, 168 n.3 (2018), quoting Commonwealth v. Domanski, 332 Mass. 66, 78 (1954).

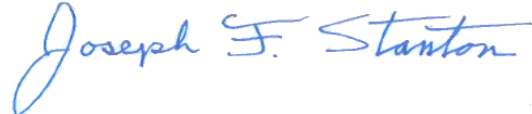
defendant has been adjudicated guilty on the underlying crimes, the issues are "moot." Commonwealth v. Milot, 462 Mass. 197, 201 (2012) ("a conviction or guilty plea to a subsequent crime renders moot an appellate claim that a judge erred in making the factual determination that a probationer violated the terms of his probation"); Commonwealth v. Pena, 462 Mass. 183, 187-188 (2012).

Only constitutional issues relating to the dispositional phase of the probation hearing remain. See Milot, 462 Mass. at 201; Pena, 462 Mass. at 187-188 ("subsequent convictions or guilty pleas do not render moot a claim, like the one made here concerning the right to counsel, that some aspect of the proceeding violated the probationer's constitutional rights, potentially impacting the second phase of the judge's probation determination, that pertaining to the disposition of the matter"). With the exception of the defendant's claim concerning the right to counsel, which we addressed supra, none

of the issues he raises relates to the dispositional phase.¹⁰

Order revoking probation
affirmed.

By the Court (Agnes, Shin &
Wendlandt, JJ.¹¹),



Clerk

Entered: June 11, 2019.

¹⁰ The defendant argues that because he has taken a direct appeal from his convictions, this principal does not apply. Assuming arguendo that he is correct, the result is the same. The judge did not abuse his discretion in finding that the percipient witness's identification of the defendant in the video was substantially reliable and, on that basis, allowing the grand jury transcript in evidence. See Commonwealth v. Durling, 407 Mass. 108, 118 (1990) ("a showing that proffered evidence bears substantial indicia of reliability and is substantially trustworthy is a showing of good cause obviating the need for confrontation"). The witness was familiar with the defendant from their prior interactions, including that the witness and the defendant resided in the same apartment for a period of time. Moreover, the witness's identification of the defendant as one of the two individuals in the videos, coupled with the videos themselves (which clearly show the defendant discharging a firearm) support the finding of a violation by a preponderance of the evidence. Commonwealth v. Nunez, 446 Mass. 54, 59 (2006). Finally, the defendant does not explain how his right to present a defense was violated by the protective order's prohibition that he be given "copies" of the grand jury materials, where his counsel had access to and used the underlying materials to present a defense. See Commonwealth v. Hartfield, 474 Mass. 474, 480 (2016) (right to present defense at probation violation proceeding is not "coextensive with the right to present a defense at trial" and depends on totality of circumstances).

¹¹ The panelists are listed in order of seniority.